Supreme Court of the United States.

NOS. 539, 540 AND 541.

A. B. WHITE, COLLECTOR, &c., *et al*,
vs.
H. C. BERRY,
} *In Equity.*

A. B. WHITE, COLLECTOR, &c., *et al*,
vs.
WILLIAM BUTLER,
} *In Equity.*

A. B. WHITE, COLLECTOR, &c., *et al*,
vs.
J. G. RUCKMAN,
} *In Equity.*

The above entitled three causes were, by stipulation of counsel, heard together upon the bills, demurrers, answers and affidavits, filed in the causes, and a final decree entered in each of the cases on the 8th day of November, 1897, perpetuating the temporary injunction and restraining A. B. White, Collector, &c., and the other defendants, from in anywise interfering with the plaintiffs in the possession of their offices, and in the discharge of their duties at the Hannisville Distillery, until they, or either of them should be removed by proper proceedings under the Civil Service Law and the Rules and Regulations made in pursuance thereof, or by judicial proceedings at law.

From this decree the defendants have appealed to this Court,

assigning thirteen grounds of error in the proceedings below. The three causes involve the same questions of law and rest upon about the same facts, and can, therefore, be considered together.

BRIEF STATEMENT OF FACTS.

On the dates of filing said bills, J. G. Ruckman and William Butler were holding the positions of storekeeper, and H. C. Berry was holding the position of gauger, at the Hannis Distillery, in the city of Martinsburg, West Virginia, under appointments made by the Secretary of the Treasury, in 1893. They allege in their bills that the defendant White, as Collector, had declared his purpose to have them removed from their offices by recommending the appointment of the other defendants named in said bills, for appointment by the Secretary of the Treasury, and the assignment of said defendants to the positions which they held; that the sole ground for the removal of said complainants was because of their political affiliations; that the sole ground for the appointment and assignment of the defendants to said offices was because of their political affiliations; that complainants had been honest, faithful and competent in the discharge of the duties of their respective positions; that they were protected from arbitrary removal for political reasons by what was known as the Civil Service Act, passed on January 16, 1883, and the Rules and Regulations promulgated in pursuance of said act and the act of March 3, 1871; that there were no vacancies that could be filled by the defendants in the offices of storekeepers or gaugers in the District of West Virginia, as there were at that time borne upon the rolls the names of appointees exceeding fifteen per cent of the number of storekeepers and gaugers actually engaged in performing duty at the time and indispensably necessary for the performance of said duty; that they were officers of the government duly assigned to their respective duties by proper and legal authority, and then in active discharge of the duties of said offices, and prayed that the Collector be enjoined from "recommending, assigning and appointing any persons to the same positions and from proceeding in the attempt to make such removals, and in any manner interfering with the plaintiffs" and further praying that the other defendants named be restrained from qualifying as storekeepers and gaugers, or from performing or discharging any

of the duties incident to the offices held by said complainants; concluding with a prayer for general relief.

To the bills of the complainants, the defendants entered a demurrer specifically setting forth fourteen grounds of demurrer in which the complainants joined. They also filed an answer, accompanied by exhibits, to which the complainants filed a general replication, and upon the issue thus joined the respective parties filed numerous affidavits, which are part of the records.

By stipulation of counsel, the Court heard the three causes upon the record as it appears before this Court, overruling the demurrer, and finding as to the facts in issue in favor of the complainants; continuing and perpetuating the injunction as prayed for in the bill.

The defendants in answer to the complainants' bills have filed a demurrer and in it they have assigned fourteen grounds why the bills should be dismissed. (Record, p 25.) After a careful examination of the causes of demurrer, I think I may confidently say that they may be embraced under three propositions, and this would apply, as well, to the assignment of error. (Record p 56.)

> *First:* That the assignment to duty or revocation of assignment, is not protected by the Civil Service Law.
>
> *Second:* That the provisions of the law, known as the Civil Service Law, are unconstitutional.
>
> *Third:* That a court of equity has no jurisdiction to interfere by its preventative remedy of injunction to grant the relief prayed for in said bills.

That the Court may be possessed of the statutes relied upon by the complainants, and the reason for their enactment, we will refer briefly to the history of the causes which led to their adoption, as well as to the provisions of the statutes we rely upon.

During thirty years of our constitutional history we had no laws fixing the tenure of office of public officials. I may confidently assert that up to 1820, by general acquiescense, the tenure of office in the federal government was only limited by merit and good behavior. It was during this period of our history that Mr. Madison made the famous remark "that the wanton removal

of a meritorious officer was an impeachable offense." Soon after that the Congress prescribed the four year limit of tenure to one or two classes of federal officials, which policy has been gradually extended until it now governs a large number of government officials. The result of the renewal of these commissions gradually brought the whole public service in the appointment of officers and employees, under what might be described in parliamentary language, the patronage of party, so that at each revolution of public sentiment the successful party claimed the right to bestow the offices of the government upon those who affiliated with them. The evils which followed from this system were soon recognized by the statesmen of the country, and the voice of warning, which was first heard in the '30's, has continued to the present time. Jefferson, in speaking of the four year tenure of office, said it "saps the constitution and salutary functions of the President, and introduces a principal of intrigue and corruption which will soon leaven the mass, not only of Senators, but of citizens." Webster was equally emphatic when he declared "I am for staying the further contagion of this plague. Men in office have begun to think themselves mere agents and servants of the appointing power." Clay, and other leaders of public thought, tried to arouse public sentiment, that they might be justified to some extent at least, in suppressing the evil, but the first act passed by Congress to control in any way the appointment of officers by the merit system, was adopted on the 3rd of March, 1853. It is found in the Revised Statutes of the United States, Sections 163 and 164.

> "Sec. 163. The clerks in the departments shall be arranged in four classes, distinguished as the first, second, third, and fourth classes.
>
> "Sec. 164. No clerk shall be appointed in any Department in either of the four classes above designated, until he has been examined and found qualified by a board of three examiners, to consist of the chief of the Bureau or office into which such clerk is to be appointed and two other clerks to be selected by the head of the Department."

These provisions were temporarily enforced, but during and after the war, became entirely obsolete. No further steps were taken until, through the urgent appeals of President Grant, on March 3, 1871, Congress passed what is now known as Section 1753 of the Revised Statutes of the United States, imposing upon the President the duty of prescribing regulations for the admission of persons into the Civil Service, and for the conduct of persons who may receive appointments.

> "Sec. 1753. The President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter; and for this purpose he may employ suitable persons to conduct such inquiries, and may prescribe their duties, and establish regulations for the conduct of persons who may receive appointment in the civil service."

As no machinery was provided by this section, its provisions were practically ignored, although the powers conferred upon the President were of the broadest character. Constant suggestions by the Presidents as to the necessity for improving the public service at last aroused a strong public sentiment in the country, and we find that all of the political parties holding conventions in 1872, and up to 1883, endorsed and approved a reform of the civil service based upon merit and efficiency. This sentiment was so decided that on the 16th day of January, 1883, Congress passed an act "to regulate and improve the Civil Service of the United States," which created a commission "to aid the President, as he may request, in preparing suitable rules for carrying the act into effect," and further provided that "when said rules shall have been promulgated, it shall be the duty of all the officers of the United States in the departments, and those to which any such rules may relate, to aid, in all proper ways, in carrying said rules, and any modification thereof, into effect."

Congress in the passage of this act, did not, as in the act of 1871, simply declare a general policy, and in broad language authorize the promulgation of rules and regulations to govern the appointment and conduct of federal officers, but it proceeded in the second section of said act to specifically declare its purpose and intention as to "eight fundamental provisions" which it deemed essential in effectuating its purpose. The Congress was careful that in the construction of this act, the specification of these "eight fundamental provisions" should not be construed as limiting the powers conferred in the first clause of the section hereinbefore mentioned; for in the second clause, which embraced the "eight fundamental provisions," the Congress used this language "and, *among other things*, said rules shall provide and declare, as near as the condition of good administration will warrant, as follows:"

For the purpose of this argument it is not necessary to refer the Court to the 1st, 2nd, 3rd, 4th, 7th, or 8th "fundamental provisions" of the rules, but we believe that the 5th and 6th, bear upon the questions involved in these causes, and sustain fully the rules and regulations promulgated in obedience to the policy therein declared. We submit that these two clauses found in the act itself, and to carry out which, the President, through the aid of the commission appointed, should promulgate such rules and regulations as would give full force and effect to the policy, declared that the question of "contribution to any political fund," the rendering of "political services," the "authority and influence" of any official in the public service, should not be used to "coerce the political action of any person," prohibits as it says in the fifth clause, "removal or prejudice" because of political activity or because of political affiliation. It declares:

> *Fifth*, That no person in the public service is for that reason under any obligation to contribute to any political fund, or to render any political service, and that he will not be removed or otherwise prejudiced for refusing to do so.
>
> *Sixth*, That no person in said service has any right to use his official authority or influence to coerce the political action of any person or body.

The above provisions in the light of the reason and purpose which influenced Congress in the passage of this law, taken in connection with the provisions contained in the tenth, eleventh, thirteenth and fourteenth sections of the act, must convince the judicial mind that as to appointments, the conduct of appointee whilst in office, and the right of removal could only be controlled for causes other than *political.*

This view is fully sustained by the commission appointed under its provisions, and the Presidents who have promulgated the rules and regulations by virtue of its authority. The correctness of this suggestion will be seen by examining the rules and regulations which refer to the issues before the Court. Clause three of rule second provides:

> 3. No person in the executive civil service shall dismiss, or cause to be dismissed, or make any attempt to procure the dismissal of, or in any manner change the official rank or compensation of any other person therein because of his political or religious opinions or affiliations.

Clause six of rule second provides:

> 6. In making removals or reductions, or in imposing punishment, for delinquency or misconduct, penalties like in character shall be imposed for like offences, and action thereupon shall be taken irrespective of the political or religious opinions or affiliations of the offenders.

and these rules and regulations were rendered more effective by the rule promulgated by President McKinley, on July 27, 1897, amendatory to the Civil Service rule 2, which provides as follows:

> "No removal shall be made from any position subject to competitive examination except for just cause, and upon written charges filed with the head of the Department, or other appointing officer, and of which the accused shall have full notice and an opportunity to make defence."

The Court being now in possession of the laws enacted by Congress, and the rules and regulations issued under authority of the provisions of said act by the Executive, which the complainants claim protects them against the unauthorized acts of their superior officers, I shall proceed to discuss the three propositions, which we believe includes all the assignments of error, as well as the causes of demurrer, suggested by the appellants.

I.

That the assignment to duty or the revocation of assignment, is not protected by the Civil Service Law.

With the view of properly presenting this question to the Court, I shall proceed to show by the statutes the manner in which these officers are appointed; the duty of the Secretary of the Treasury; the power conferred by law upon the Commissioner of Internal Revenue; and the authority for their removal.

Section 3153 of the Revised Statutes provides for the appointment of storekeepers and gaugers by the Secretary of the Treasury; their compensation, oath of office, and execution of bond. Under authority of the Legislative, Judicial and Executive Appropriation Act of 1885, 23rd Statutes-at-Large, 172, the law recognizes the right of the Collector of the district to recommend for appointment both storekeepers and gaugers, and limits the number that can be appointed, as follows:

> "And no Collector in any district shall recommend, nor shall there be appointed nor commissioned, more deputy-collectors, storekeepers, storekeepers and gaugers, gaugers, inspectors, or other officers, or allowed to remain in commission more of any of said officers, at any one time, than fifteen per cent in excess of the number engaged in performing duty at the time, and indespensably necessary for the performance of said duty."

The appointment of storekeepers is provided for in the following section:

> "There shall be appointed by the Secretary of

the Treasury such number of internal revenue storekeepers as may be necessary, who shall receive such compensation, not exceeding four dollars a day, to be paid monthly, by the United States, as may be determined by the Commissioner of Internal Revenue. No storekeeper shall be engaged in any other business while in the service of the United States, without the written permission of the Commissioner of Internal Revenue. Every storekeeper shall take an oath faithfully to perform the duties of his office, and shall give a bond, to be approved by the Commissioner of Internal Revenue, for the faithful discharge of his duties, in such form and for such amount as the Commissioner may prescribe."

Section 3156 provides for the appointment, oath and bond of gaugers:

"Sec. 3156. The Secretary of the Treasury shall appoint in every collection district where they may be necessary, one or more internal revenue gaugers, who shall each take an oath faithfully to perform his duties, and shall give bond, with one or more sureties, satisfactory to the Commissioner of Internal Revenue, for the faithful discharge of the duties assigned to him by law or regulations; and the penal sum of said bond shall not be less than five thousand dollars, and said bond shall be renewed or strengthened as the Commissioner of Internal Revenue may require. The duties of every such gauger shall be performed under the supervision and direction of the collector of the district to which he may be assigned, or of the collector in charge of exports at any port of entry to which he may be assigned."

And the compensation of gaugers is provided for in section 3157:

"Sec. 3157. Gaugers shall be entitled to receive

> such fees, to be determined by the quantity gauged, as may be prescribed by the Commissioner of Internal Revenue; and said fees, together with their actual and necessary traveling expenses, shall be verified by their oaths, and shall be paid by the United States monthly."

And the compensation of both is further limited by the provisions found in the Legislative, Executive and Judicial Appropriation Act approved Aug. 15, 1876.

> "Hereafter no storekeeper shall receive a greater compensation than four dollars per day; and said gaugers and storekeepers respectively shall only receive compensation when rendering actual service."

The power to assign to duty a storekeeper, when once appointed, is conferred by law upon the Commissioner of Internal Revenue. (Sec. 3154., Int. Rev. Laws.)

> "One or more storekeepers shall be assigned by the Commissioner of Internal Revenue to every bonded or distillery warehouse established by law; and any storekeeper may be transferred * * * by the Commissioner of Internal Revenue, from one warehouse to another,"

but under the provisions of Section 3163, the Commissioner of Internal Revenue is given authority to transfer these officers. It provides:

> "The Commissioner may also transfer any inspector, gauger, storekeeper, or storekeeper and gauger, from one distillery, or other place of duty, or from one collection district, to another,"

and this authority is further conferred by section 3163–B:

> "Sec. 3163*b*. *Sec. 63, act of August 28, 1894.* That storekeepers, and storekeepers and gaugers,

when transferred from one distillery to another, either in the same district or in different districts, shall receive conpensation not exceeding four dollars per day during the time necessarily occupied in traveling from one distillery to the other, together with actual and necessary traveling expenses."

These are all of the Internal Revenue provisions bearing upon the question of assignment or transfer of storekeepers and gaugers. The Court will observe that the power of appointment of these officers is conferred on the Secretary of the Treasury. The complainants have not questioned the authority of the Commissioner of Internal Revenue to assign them to duty at any distillery within the district, or to transfer them from duty in one district to duty in another district. The contention of the complainant Ruckman is that he was about to be removed from the position of head, or day, storekeeper, who has charge of the books at the distillery, responsible for the keys of the different buildings upon the grounds, and is, in fact, a supervisor over what is known as additional storekeepers; that this reduction in rank was because of his political sentiments; that he was to be reduced in rank and deprived of the dignity of his position, if not removed entirely from office, and he relied upon clauses three and six of rule second of the Civil Service Regulations to resist the attempt of the Commissioner of Internal Revenue to change his official rank. I refer to said rules printed on page 7.

The contention of storekeeper Butler and gauger Berry is that there rests no power in the Commissioner of Internal Revenue to revoke an assignment to duty under the provisions of the Internal Revenue Law, they contending that the revocation of assignment is, in fact, a removal; that it deprives them of the honor, dignity and emoluments of the offices and that no such authority has been conferred upon the Commissioner by law. It is admitted further, in the record, that the Commissioner exercised the power of revoking the assignment to duty of both storekeeper Butler and gauger Berry. The authorities lay down the well established proposition that even without an affirmative act revoking the powers and removing the officer, which was done in this case, that the appointment of a successor is *ipso facto* a

removal. (Throop Public Officers, Sec. 350.) This is, of course, to be understood where the office is held during the pleasure of the appointing power, and if the Secretary of the Treasury, who alone under the law had the power of removal, had appointed the successors to the complainants, and they were not protected by the Civil Service Law, and the rules and regulations made in pursuance thereof, it would necessarily have been a removal. The law confers, however, upon the Commissioner only the power to *transfer* or *assign to duty*, and his act revoking the assignment absolutely must be held null and void as without authority of law.

It is therefore not necessary at this point to discuss whether the office was held at the pleasure of the appointing power or not, as the revocation of assignment or the removal from office was not attempted to be made by the Secretary of the Treasury, but attempted by the Commissioner of Internal Revenue.

II.

That the provisions of the laws, known as the Civil Service Law, are unconstitutional.

It is neither the province of the Court or of counsel to consider whether Congress in the exercise of its granted powers, has acted wisely or unwisely in the passage of the laws to improve the Civil Service of the government. The sole question is whether they have exceeded their constitutional powers. That the federal government is a government of delegated powers only and that the authority of Congress to pass a given act, must be found in the authority conferred in the instrument itself, will not, of course, be questioned. Chief Justice Marshal in McCulloch *vs.* Maryland, 4 Wheaton, 423, says:

> "But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This Court disclaims all pretensions to such a power."

and

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."

By Article 2, Section 2, of the Constitution, it is provided :

> "But the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

and in the 1st Article, 8th Section and 18th Clause, it is provided that Congress may

> "Make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

By the law which we have referred to, both storekeepers and gaugers are, under its provisions, appointed by a Head of Department, the Secretary of the Treasury, their duties, oath of office and bond constitutes them inferior officers within the meaning of the Constitution, and the question presented to the Court is, whether the Congress, having created these offices, under authority conferred upon it by the Constitution, can impose any restrictions or limitations upon their appointment, conduct or tenure. At common law it was almost universally held that a person, once vested with the title to an office, and having entered upon the discharge of its duties, could only be removed for cause.

(Baggs case, 11 Coke, Vol. 6, 98b.)

The common law is not, however, a part of the jurisprudence of the federal government, except so far as made so by statute,

and the doctrine laid down in the case of Ex Parte Duncan N. Henning, 13 Peters, 259, is the rule which has been almost universely acquiesced in in this country. That

> "All offices, the tenure of which is not fixed by the constitution or limited by law, must be held either during good behavior, or (which is the same thing in contemplation of law) during the life of the incumbent; or must be held at the will and discretion of some department of the government, and subject to removal at pleasure."

The learned judge further says on the same page:

> "In the absence of all constitutional provision, or statutory regulation, it would seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment."

(Waites Action and Defenses, Sec. 14, authorities referred to.)

> "The right of the legislature to prescribe the conditions or the specific causes for a removal of an officer, has been recognized in many of the states and limits the power of removal to the conditions and causes so specified."

People *vs.* Higgins, 15 Ill., 110.
Mayor, *et al*, *vs.* Shaw, 16 Ga., 172.
Clark *vs.* People, 15 Ill., 213.
Lowe *vs.* Comm., 3 Met., (Ky.), 237.
Dubuc *vs.* Voss, 19 La., An., 210.
Meade *vs.* Treasurer, 36 Mich., 416.
State *vs.* Jersey City, 25 N. J. L., 536.
Gardner *vs.* People, 62 N. Y., 299.
Comm. *vs.* Shaun, 3 W. & S. (P.), 338.

The reverse of this doctrine must be equally true, and be sustained upon the same ground, that where the legislature prohibits the removal for political reasons, it is within the legislative dis-

cretion to do so. It is claimed, however, that this is an executive act and it is therefore not subject to a review by the judicial department of the government. The act of a subordinate executive officer, involving no judgment or discretion and done without authority of law, has been frequently the subject of review by the judicial department.

Kendall *vs.* United States, 12 Peters, 524.
United States *vs.* Schurz, 102 U. S., 378.
Butterworth *vs.* United States, 112 U. S., 50.

The Court has followed the declaration of Marshall in Marbury *vs.* Madison, 1 Cranch 137, in which he declares the exception. Speaking of the power of the Court to review an executive act, he says :

> "This power in the Courts is the difference between a government by law and a government by men."

The question as to the power of Congress to further provide conditions and limitations upon the conduct of public officials, and as to their removal, has been fully passed upon in the case of Ex parte Curtis, 106 U. S., 371, and in the case of the United States *vs.* Perkins, 116 U. S., 483 ; that the question is no longer open for discussion. The Court held in that case that

> "We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed."

III.

That a Court of Equity has no jurisdiction to interfere by its preventative remedy of injunction to grant relief prayed for in said bills.

The complainants aver that they were in possession of the offices of storekeeper and gauger, and at the date of filing of said bills, were in the full and uninterrupted discharge of the duties of said offices; that they held the title, and claimed the emoluments and honors of said offices until removed in accordance with law; that certain parties whom they made defendants to said bills are, without authority of law, seeking to oust them from that possession; that they asked the intervention of a court of equity to prevent their forcible dispossession, averring that if once ousted they would not have a plain, adequate and complete remedy at law for the injury done them; that they would be in possession of a right without a remedy that would reach the "whole mischief and secure the whole right in a perfect manner, at the *present* and in the *future*."

The claim of appellants that equity can only interfere in a case of property rights does not weaken the position of the complainants. As stated by Judge Cooley, "The incumbent has a property right in it," referring to the offices. (Throop Public Officers, Section 23.)

When the jurisdiction of a court of equity is questioned we must refer to the fundamental principles on which its jurisdiction rests, to ascertain the extent and limitation of its powers. With this view, I refer the Court to 1st Story's Equity Jurisprudence, Secs. 26, 27, 30 and 32. I shall only quote in this brief, however, what Judge Story regards as the most complete and perfect definition that has yet been given of the extent of the jurisdiction of a court of equity.

> "It has a jurisdiction in cases of right, recognized and protected by the municipal jurisprudence, where a plain, adequate and complete remedy cannot be had in the Courts of Common Law. The remedy must be plain, for if it be doubtful and obscure at law, equity will assert jurisdiction; it must be adequate, for, if at law it falls short of what the party is entitled to, that founds a jurisdiction in equity; and it must be complete; that is, it must attain the full end and justice of the case. It must reach the whole mischief and secure the whole right to the

party in a perfect manner, at the present and in the future; otherwise equity will interfere and give such relief and aid as the exigency of the particular case may require. The jurisdiction of a court of equity is, therefore, sometime concurrent with the jurisdiction of a court of law; it is sometimes exclusive of it; and it is sometimes auxiliary to it."

We submit to the Court upon principle, that had the complainants yielded possession of the offices held by them at the date of the issuing of injunction there could have been no plain, adequate or complete remedy, which under the view of Mr. Story would have reached the whole mischief and secure the whole right in a perfect manner, *"at the present time and in the future."* Under any proceedings known to the Courts of Common Law, the emoluments of the offices would have been lost to the complainants, for in the Legislative, Executive and Judicial Appropriation Act of Aug. 15, 1876, (19 Stat. 152) it is provided that said "gaugers and storekeepers shall only receive compensation when rendering actual service."

A writ of *quo warranto* would have been doubtful, not a plain remedy, as courts have refused to grant relief applied for by former occupants of office, on the ground that his dismissal from office had been illegal, where it was satisfied that if he should be reinstated, he might be legally dismissed.

Ex parte Richards, 3 L. R. Q. B., div. 368; 47 L. R. Q. B., 498.
State *vs.* Tudor, 5 Day (Conn.) 329.
State *vs.* Porter, 58 Iowa, 19.
State *vs.* Jacobs, 17 Ohio, 143.
Attorney General *vs.* Megin, 63 N. H., 378.

Mandamus would not lie as it is a writ that does not properly try the question of title.

Throop Public Officers, Secs. 787, 789, 790.
Parks *vs.* Boston, 8 Pick. (Mass.) 218.

Certiorari will be refused when the proceedings are of a ministerial character.

People *vs.* Walter, 68 N. Y., 403.

It will not lie to review proceedings of inferior tribunals, boards, officers, etc. :

State vs. Bassett, 33 N. J. L., 26.
State *vs.* Trinity Church, 45 N. J. L., 230.
Parsell *vs.* State, 30 N. J. L., 530.
State *vs.* Pierson, 37 N. J. L., 363.
Alexander *vs.* Municipal Ct., 66 Cal., 387.
Hayward, Petitioner, 10 Pick., (N. Y.) 358.
Sammis *vs.* Brice, 4 Den., (N. Y.) 576.
People *vs.* Board of Police, 6 Hun., (N. Y.) 229; 52 How. Pr. (N. Y.) 289.
People *vs.* Fire Commissioners, 100 N. Y., 82.
Borough *vs.* Sewickley, 36 Pa. State, 90.
Freeman *vs.* School Directors, 37 Pa. State, 385.
Polk County *vs.* DesMoines, 70 Iowa, 351.
Midland County *vs.* Auditor General, 27 Mich., 165.
Ex parte Vallandigham, 1 Wall (U. S.) 249.

An appointment of a member of a board of supervisors by a county judge is a ministerial and not a judicial act, and cannot be reviewed by certiorari.

People *vs.* Bush, 40 Cal., 344.
Phelps Co. *vs.* Bishop, 46 Mo., 40.

Certiorari would not meet the case presented in the record because the writ lies only to review a judicial proceeding or a *quasi* judicial proceeding, and it is not the province of the certiorari to try the title of an office, nor will it lie to review a decision that has been executed by the party having been placed in the possession of the offices.

Throop Public Officers, Secs. 801, 802, 806 and 809.

In our analysis of the decision on the question of jurisdiction of a court of equity to interfere by its process of injunction, we have reached the conclusion that there are three classes of decisions bearing upon this question.

First: It is admitted by all of the decisions, that

a court of equity cannot try a title to an office.

Second: That a court of equity will not intervene to prevent the exercise of a right claimed by an official to remove an officer.

Third: That a court of equity will, in a proper case, enjoin one from disturbing the possesion, and protect the incumbent from ouster, when at the time of issuing the writ, the complainant is in full occupancy of the office, and in the discharge of its duties, until the claimant shall try his title at law.

The complainants claim, that the cases at Bar are within the reason and principle of the third class of cases; that in the rapid development in the latter part of this century of the social and material interests of the people, many latent principles of equitable jurisprudence have been applied to new cases, and courts of equity have within recent years exercised the power to review, even the exercise of discretionary power vested in a public officer, whenever its interference is necessary, in order to prevent abuse, injustice or oppression.

Hill *vs.* Thompson, 48 N. Y., (Suprm. Ct.) 481.
Davis *vs.* Mayer, *et al*, 1 Duer, (N. Y.) 451.
People *vs.* Sturtevant, 9 N. Y., 263.

Chief Justice Waite, in the case of Ex parte Sayer, 124 U. S. 223, in a dissenting opinion in that case gave expression to these views:

"I am not prepared to decide that an officer of a municipal government cannot, under any circumstances, apply to a court of chancery to restrain the municipal authorities from proceeding to remove him from his office without the authority of law. There may be cases, in my opinion, when the tardy remedies of *quo warranto*, *certiorari*, and other like writs will be entirely inadequate. I can easily conceive of circumstances under which a removal, even for a short period, would be productive of irremedial mischief. Such cases may rarely occur, and

> the propriety of such an application may not often be seen; but if one can arise, and if the exercise of the jurisdiction can ever be proper, the procedings of the court in due course upon a bill filed for such relief will not be void, even though the grounds on which it is asked may be insufficient."

If a case could be presented to the court, where an injury by removal, during the pendency of the proceeding at law, would be irreparable, and where no plain, adequate or complete remedy at law existed, the cases at bar would present that illustration, for under the acts of Congress the compensation of the officer would necessarily be lost during that period, as he was not "rendering actual service." The more recent authorities place this ground of equitable jurisdiction upon a higher plane, on that which involves the interest of the public and of society. The Court recognizes the autocratic power exercised by government officials over subordinates, whether they are acting within the scope of the power conferred upon them or not, but in the case of Guillott *vs.* Poicy, 41 La. An. 333, says:

> "It is in the interest of social peace and order and conforms to the object and policy of the law in all remedial provisions for the settlement of disputed rights, which always respects and maintains the *status quo* until the controversy shall be settled in the orderly course of judicial proceedure."

The Court further held that "an officer cannot be dispossessed by a third person, whose title he disputes, until the latter shall first try the disputed right. The reason is very obvious, why the claimant cannot take the law into his own hands, even with the assistance of others, and oust the incumbent in advance of judicial determination of the disputed right."

Mr. High, in his work on Injunctions, 1st edition, did not recognize this extent of equitable jurisdiction, but in his second edition, published as early as 1880, he appreciated the advance made by the courts of equity in extending their jurisdiction to cover such cases. He says in section 1315:

> "While, as is thus shown, courts of equity uniformly refuse to interfere by the exercise of their preventative jurisdiction to determine questions relating to the title to office, they frequently recognize and protect the possession of officers *de facto*, by refusing to interfere with their possession in behalf of adverse claimants, or, if necessary, by protecting such possession against the interference of such claimants. * * Upon the other hand, the actual incumbents of an office may be protected, pending a contest as to their title, from interference with their possession, and with the exercise of their functions. Thus, the officers *de facto* of a school district may restrain persons from claiming to be officers *de jure*, but who are not in possession, from taking possession of the school house, and from interfering with the plaintiffs in their employment of teachers, and in their managements of school affairs; and this notwithstanding the facts that the defendants thus enjoined claim to be the legally elected officers, and have instituted proceedings in *quo warranto* to establish their title. And the granting of an injunction in such case in no manner determines the question of title involved, but merely goes to the protection of the present incumbents against the interference of claimants out of possession, and whose title is not yet established."

In a recent work entitled American and English Decisions in Equity, third volume, page 440, the same principle is laid down that

> "The actual incumbent of an office whether *de jure* or *de facto*, if duly qualified, and if in office by virtue of a certificate of election issued by the proper officers, will be protected by injunction against interference with his possession thereof,"

and the author cites the following cases:

Braidy *vs.* Sweetland, 13 Kans., 41.
Braidy *vs.* Therett, 17 Kans., 469.
Guillott *vs.* Poicy, 41 La. An., 333.
Parmer *vs.* Foley, 45 How. Prac., (N. Y.) 110.
State *vs.* Superior Snohomish Co., (Wash.) 46 Pacific Reports, 441.
Wheeler *vs.* Board Fire Commissions, 46 La. An. 731.
Armitage *vs.* Fisher, 74 Hunt. (N. Y.) 167.
Kerr *vs.* Trego, 47 Penn., 292.
Board of Liquidation vs McComb 92 U.S. 541

Questions of fact arising upon the answer have been so thoroughly analyzed by the learned judge, who decided the cases below in his opinion, which is filed as a part of the record, that I refer the Court in the case of White *vs.* Berry, to the discussion of these facts. (Record, pages 41, 42, 43 and 44); in the case of White *vs.* Butler (Record, pages 43, 44, 45 and 46); and in the case of White *vs.* Ruckman (Record, pages 51, 52, 53 and 54.)

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